

48A C.J.S. Judges § 240

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

IX. Disqualification to Act

B. Waiver of Disqualification

2. Acts Constituting Waiver

§ 240. Participation in proceedings

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  52, 53

Generally, a waiver of the disqualification of a judge results when, after the judge is permanently assigned, the party participates before the judge in any judicial proceeding which concerns the merits of the action.

Generally, a waiver of the disqualification of a judge, who has been permanently assigned to hear the case, results when the party participates before the judge in any judicial proceeding¹ which concerns the merits of the action.² The "merits of the action" means significant legal rights as distinguished from technicalities relating to only procedure or form.³

In regard to a rule allowing a change of judge as a matter of right, a motion to dismiss for failure of a pleading to state a claim upon which relief can be granted concerns the merits of the case and may constitute a waiver of the right to request a change of judge.⁴ Further, a party may be deemed to have waived any claim of disqualification by seeking a ruling on a controverted question,⁵ by participating in a hearing involving a contested issue of law or fact,⁶ or by entering a guilty plea in a criminal prosecution,⁷ especially where the plea agreement controls the sentence.⁸ Also, the right to obtain a judge's disqualification may be waived by waiting until after the judge has received evidence in the case.⁹ There may also be a waiver where a party permits the cause to be set for trial without objection as to the judge's qualification.¹⁰ Similarly, an appellant, of course, waives any objection to a district judge's qualifications by failing to object to a district judge's authority to sit for an absent supreme court justice until after the decision has been rendered.¹¹ Under some statutes, a party may waive the right to the change of a judge simply by submitting to the jurisdiction of the court.¹²

However, a party does not waive the right to peremptorily challenge a judge where the party does not knowingly participate before the judge.¹³ Likewise, a defendant does not waive an objection to the assignment of a new judge, where the assigned judge has made no ruling on any issue in the case before the defendants make their formal objection, at the first time the judge conducts a proceeding in the case.¹⁴ Further, although a judgment of dismissal with prejudice entered pursuant to parties' stipulation is as conclusive as a judgment on the merits, where the judge considers only the stipulation, not evidence or affidavits on the merits, such a judgment of dismissal is not a "legal determination" by a court of matters in controversy, and the right to a change of judge is not waived.¹⁵

Previous proceedings.

Participating in proceedings in a previous case does not waive a party's right to a change of judge in a new action.¹⁶ However, in an action seeking judicial review of an issue, a trial court did not err in denying a party's affidavit for a change of judge on remand where the party waived its right to request a change of judge when it initially submitted to the jurisdiction of that judge in the original action.¹⁷

CUMULATIVE SUPPLEMENT

Cases:

Defendant, who pleaded guilty to second-degree burglary, expressly waived any potential conflict arising from the fact that trial judge's son, a police officer, was an investigator in the case, and thus judge was not statutorily disqualified and acted within his discretion in eliciting a waiver of the potential conflict of interest from defendant; when officer's limited involvement in the investigation was disclosed at the outset of plea proceedings, both defendant and defense counsel indicated that they had no objection to the trial judge presiding over the case, and, after defendant was sworn, he reaffirmed that he had no objection. *N.Y. Judiciary Law § 14. People v. Huebsch*, 199 A.D.3d 1174, 156 N.Y.S.3d 597 (3d Dep't 2021).

[END OF SUPPLEMENT]

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Footnotes

- 1 Alaska—*Tunley v. Municipality of Anchorage School Dist.*, 631 P.2d 67 (Alaska 1980).
Tex.—*In re Canales*, 52 S.W.3d 698 (Tex. 2001).
Litigation of challenge for cause against assigned judge as not constituting participation before judge
Alaska—*DeNardo v. Municipality of Anchorage*, 938 P.2d 1099 (Alaska Ct. App. 1997).
- 2 Alaska—*Tunley v. Municipality of Anchorage School Dist.*, 631 P.2d 67 (Alaska 1980).
- 3 Ariz.—*Dudley v. Superior Court, In and For Maricopa County*, 123 Ariz. 80, 597 P.2d 983 (1979).
- 4 Alaska—*Kodiak Island Borough v. Large*, 622 P.2d 440 (Alaska 1981).
As to filing of motions and pleadings, generally, see § 241.

- 5 Nev.—State ex rel. Welfare Division of State Dept. of Health, Welfare and Rehabilitation v. Eighth Judicial Dist. Court, Dept. Four, 85 Nev. 642, 462 P.2d 37 (1969).
- 6 Ariz.—State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985), judgment aff'd, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986).
- Habeas corpus proceeding**
Ga.—Nix v. State, 236 Ga. 110, 223 S.E.2d 81 (1976).
- Hearing on petition for postconviction relief**
Tenn.—Grant v. State, 542 S.W.2d 626 (Tenn. Crim. App. 1975).
- 7 Mo.—McDaris v. State, 843 S.W.2d 369 (Mo. 1992) (overruled on other grounds by, State v. Carson, 941 S.W.2d 518 (Mo. 1997)).
- S.D.—State v. Burgers, 1999 SD 140, 602 N.W.2d 277 (S.D. 1999).
- 8 Mo.—McDaris v. State, 843 S.W.2d 369 (Mo. 1992) (overruled on other grounds by, State v. Carson, 941 S.W.2d 518 (Mo. 1997)).
- 9 Ariz.—State v. Carpenter, 1 Ariz. App. 522, 405 P.2d 460 (1965).
- 10 Ind.—McAllister v. State ex rel. Bryant, 258 Ind. 238, 280 N.E.2d 311 (1972).
- 11 Neb.—ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).
- 12 S.D.—Fullmer v. State Farm Ins. Co., 514 N.W.2d 861 (S.D. 1994).
- 13 Alaska—Irby v. Fairbanks Gold Min., Inc., 203 P.3d 1138 (Alaska 2009).
- 14 Ala.—Ex parte Jim Walter Homes, Inc., 776 So. 2d 76 (Ala. 2000).
- 15 Ariz.—City of Sierra Vista v. Cochise Enterprises, Inc., 128 Ariz. 467, 626 P.2d 1099 (Ct. App. Div. 2 1979).
- 16 Ariz.—Godoy v. Hantman, 205 Ariz. 104, 67 P.3d 700 (2003).
- 17 S.D.—Matter of Establishing Certain Territorial Elec. Boundaries Within South Dakota, 318 N.W.2d 118 (S.D. 1982).